



# Commonwealth of Massachusetts State Ethics Commission

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**SUFFOLK, ss.**

**COMMISSION ADJUDICATORY  
DOCKET NO. 673**

## **IN THE MATTER OF PAUL PATHIAKIS**

Appearances: Wayne Barnett, Esq.  
Counsel for Petitioner

Kathleen Hill, Esq.  
Counsel for Respondent

Commissioners: Wagner, Ch.,<sup>1</sup> Roach, Dolan, Todd, Daher, Ch.,<sup>2</sup> Maclin<sup>3</sup>

Presiding Officer: Commissioner Elizabeth J. Dolan

### **DECISION AND ORDER**

#### **I. Procedural History**

On February 4, 2003, the Petitioner issued an Order to Show Cause (OTSC) in this matter against the Respondent (Pathiakis). The OTSC alleged that Pathiakis, as an Upton (Town) Technology Committee (UTC) member, violated § 19 of G.L. c. 268A by participating in a decision to select a computer vendor when he had a financial interest in the decision. The OTSC further alleged that Pathiakis violated § 20 of G.L. c. 268A by having a financial interest in a contract between the UTC and TWM Systems.

Pathiakis filed an Answer on February 24, 2003, generally denying all of the allegations and asserting sixteen affirmative defenses.

Beginning in March 2003, the parties engaged in discovery. A pre-hearing conference was held on April 29, 2003. Also on April 29, Pathiakis filed a Motion seeking leave to amend his Answer to include two additional defenses.

On June 4, 2003, the Presiding Officer held a hearing on the Petitioner's Motion to Strike Affirmative Defenses and to narrow the scope of the proceedings. Following oral arguments by the parties, the Presiding Officer entered an Order striking some defenses and allowing others. Pathiakis had voluntarily agreed to withdraw one of the defenses proposed in the amended Answer and the Presiding Officer denied Pathiakis' Motion to Amend his Answer to add the other defense.

An adjudicatory hearing was held on portions of June 19, 20 and 23 and August 12, 2003. The parties presented closing arguments to the Presiding Officer on August 12, 2003. After Petitioner's opening statement, after the close of Petitioner's case, and at the close of all of the evidence, Pathiakis moved for a Dismissal. The Presiding Officer denied the motion each time.

The Commission began deliberations in this matter on August 14, 2003.

## **II. Findings Of Fact**

1. Paul Pathiakis was a member of the Upton Technology Committee between spring 2001 and February 2002. The Selectmen voted to appoint Pathiakis to the UTC on February 27, 2001. The Board of Selectmen appoints all members of the UTC.
2. After being appointed by the Selectmen to the UTC and prior to March 21, 2001, Pathiakis took an oath of office before the Town Clerk.
3. The UTC has a budget funded by tax revenues and appropriated by Town Meeting.
4. The duties of the UTC include providing technical direction to the Town, researching available information technology, and advising the Town about how to fill the Town's technology needs.
5. The Selectmen had requested that the UTC establish a computer system in the Town Hall that would connect all of the Town offices to a local location where each office could send e-mail and back up data in the event of a system failure. The project was intended to update the computer systems in Town Hall. The UTC discussed this request for a number of years prior to November 2001.
6. The Board of Selectmen wanted Town Departments to review department computer purchases with the UTC so that the various departments would have the same equipment.
7. In May 2001, for the FY 2002 fiscal year, the Town Meeting, voted to allocate \$11,200 in tax revenues to the UTC for Internet access, hardware and software and miscellaneous expenses.
8. At all times relevant, Joan Shanahan was the designated Selectman liaison to the UTC.
9. As Selectman liaison to the UTC, Ms. Shanahan did not have the authority to take action on behalf of the Board of Selectmen. If an issue arose, Shanahan was required to refer the matter to the Board of Selectmen.<sup>4</sup>
10. Ms. Shanahan advised Pathiakis, in the fall of 2001, that he could not be a

contractor or work with a contractor to the Town while he served on the UTC.<sup>5</sup>

11. Selectman Shanahan knew, in December 2001, that Pathiakakis was thinking about contracting with TWM Systems to do the server work.<sup>6</sup>
12. Pathiakakis holds a Bachelor of Science degree in Computer Science. Pathiakakis has been employed at various times since 1988 in the computer industry, holding such positions as software engineer and UNIX systems administrator.
13. In November – December 2001 the UTC vendors were Memory Plus, Mendon Computer Outlet, and TWM Systems.
14. On November 14, 2001 the UTC, with Pathiakakis participating, voted to award TWM Systems a contract to provide the Town with file server hardware. TWM Systems purchased piece parts and put the components in the computer but did not do an operating system configuration before it left TWM Systems.
15. In reaching its decision to obtain a new operating system for the Town, the UTC wanted, among other things, to have file sharing so everyone working in Town Hall could share information, to reduce other costs, to improve system security and to increase speed of network access.
16. The Town planned to use a UNIX operating system that was downloadable and free of charge for its file server software.
17. At the time of the hardware purchase, Tom McGovern, the TWM Systems representative, informed the town that TWM Systems could not provide the configuration services for the file server.<sup>7</sup>
18. In December 2001, the UTC was attempting to configure the file server to the selected operating system.
19. Pathiakakis was present at the December 5, 2001 UTC meeting.
20. At its December 5, 2001 meeting, the UTC discussed hiring a vendor to configure the server. Pathiakakis participated in this discussion.<sup>8</sup>
21. In December 2001 Pathiakakis was unemployed. He suggested to the UTC that he would research and contract with a third party. He suggested to the UTC “that if we couldn’t find anyone qualified or at a reasonable price, if they wanted to, I would contract the work and get EVERYTHING (server configuration, client configuration and a whole lot more) in 70-100 hours of work at a highly reduced rate.”<sup>9</sup>
22. At the December 5, 2001 UTC meeting, the Committee decided that Pathiakakis should create a scope of work for configuration of the server, seek quotes and confirmation whether one of the three vendors was capable of doing the work.

In the event that none of the three vendors could provide the service, Pathiakis was to request if one of the vendors would allow him to subcontract with the vendor to perform the services.<sup>10</sup>

23. The UTC knew that if Pathiakis did the work that the Town costs would be decreased.
24. As directed by the UTC, Pathiakis contacted three vendors: Memory Plus of Westborough, MA; Mendon Computer Outlet of Mendon, MA; TWM Systems of Hopedale, MA.
25. Pathiakis asked each of the vendors if it could provide the required work, what the hourly rate would be, and what would be the number of hours required to do the work.
26. Memory Plus advised Pathiakis that the server work would entail approximately 200 hours and would be costly. Mendon Computer Outlet advised Pathiakis it did not offer the requested services.
27. On December 10, 2001, by e-mail, Pathiakis sent TWM Systems a request for a quote for services to configure the server. This request described the services sought by the Town. In this request Pathiakis identified himself as a member of the UTC.
28. Pathiakis was the first UTC contact TWM Systems had about configuration of the file server.
29. Tom McGovern was the representative of TWM Systems, which was his spouse's company.
30. TWM Systems installs new computers, repairs computers, and provides services to small businesses that own computers.
31. TWM Systems gives its municipal clients discounts to help keep the municipal tax rates down.
32. After receiving a request to quote on the configuration of the software for the server, Tom McGovern asked Pathiakis for details about the scope of the work and the amount of time.
33. On December 12, 2001 Pathiakis sent an additional e-mail to TWM Systems identifying himself as a UTC member, detailing the specific tasks the Town required, and estimating that the program services should not exceed 70 hours.
34. On December 12, 2001, Pathiakis sent an e-mail to the UTC indicating that another vendor was unable to provide the requested services.

35. Tom McGovern informed Pathiakakis that TWM Systems was unable to provide the full scope of services. McGovern advised Pathiakakis that no other computer company in the immediate area could likely fulfill the tasks. McGovern provided Pathiakakis with a verbal estimate that the work would cost between \$120 - \$200 per hour to obtain the services of a specialist from Framingham or Boston.<sup>11</sup>
36. On December 12, 2001 Pathiakakis advised Tom McGovern that he had the expertise to do the Town server configuration and that he had been laid off from his job. Pathiakakis suggested to McGovern that he be considered for the job as a contractor through TWM Systems. McGovern informed Pathiakakis that he should "clear" the idea with the UTC and the Selectmen's Office.
37. McGovern requested that Pathiakakis obtain permission to do a subcontract. He was concerned about a conflict of interest if TWM Systems hired a member of the UTC to work on the Town contract. Subsequent to this conversation Pathiakakis informed McGovern that he had permission to subcontract. Tom McGovern would not have hired Pathiakakis unless Pathiakakis had obtained permission.<sup>12</sup>
38. Pathiakakis proposed to Tom McGovern that TWM Systems charge the Town \$65/hour and that TWM Systems take \$5/hour for administrative expenses. He proposed charging \$60/hour for his time.
39. TWM Systems provided Pathiakakis, as the UTC representative, with a quotation for its services.
40. TWM Systems charged the Town \$65 per hour. TWM Systems paid \$60 per hour to Pathiakakis.
41. TWM Systems provided a discount to the Town for the work configuring the file server.
42. Pathiakakis, as the UTC representative, informed McGovern that the UTC had retained TWM Systems. Pathiakakis, on behalf of the UTC, approved TWM Systems quote for services to configure the server.<sup>13</sup>
43. Pathiakakis entered an oral contract with TWM Systems for configuration of the Town's server.
44. On December 15, 2001, Tom McGovern, on behalf of TWM Systems, sent an e-mail requesting that Pathiakakis report to work at TWM Systems on December 17, 2001 to discuss the Town project, submit some paperwork and meet his assistant. According to the e-mail, Pathiakakis would be provided with work orders for tracking the billings and tasks. From these work orders TWM Systems would create a bill to send to the Town and "cut a check" for Pathiakakis.

45. In a response to the December 15, 2001 McGovern e-mail, Pathiakis indicated he wanted to begin work December 17, 2001 and complete all of the work the week of December 17, 2001.
46. Pathiakis began work on the server for TWM Systems prior to December 19, 2001.<sup>14</sup>
47. On Tuesday December 18, 2001, Pathiakis, in an e-mail, provided Tom McGovern with a progress update of work completed (as initially described on the task list he submitted to McGovern on December 12, 2001), and his plan for continued work on Wednesday December 19, 2001 and Thursday December 20, 2001.
48. At the December 19, 2001 UTC meeting, Pathiakis reported that he had located TWM Systems as the vendor to configure the server. He informed the UTC that TWM Systems had agreed to allow him to subcontract the work; he had completed a rough configuration; and he hoped to have the work completed by the end of 2001.
49. Paul Pathiakis informed the UTC that TWM Systems was the sole bid.
50. On December 19, 2001 the UTC voted to hire TWM Systems to program the Town server for the network and Internet connections. Paul Pathiakis abstained from the vote.
51. On December 22, 2001, Pathiakis sent an e-mail to the UTC and to Tom McGovern. Pathiakis provided an update concerning the tasks completed and the remaining work.
52. On December 28, 2001, Pathiakis requested that the UTC pay TWM Systems for the contractor. He indicated that the bill would likely be \$4,420, which was 68 hours at \$65/hour. He noted that this was a discount as the usual rate was \$80/hour. Pathiakis was "the contractor" described in the e-mail.
53. Pathiakis prepared a TWM Systems work order that identified the customer as the Upton Technology Committee and the technician as himself. The total on the work order was \$4,550. All of the tasks itemized in the work order, with hours and billing rates, were included in a billing invoice submitted to the UTC. The billing invoice, dated January 4, 2002, totaled \$4,550.
54. On December 29, 2001, Pathiakis provided the UTC with another progress report.
55. On December 30, 2001, Pathiakis sent Tom McGovern an e-mail, advising McGovern that the work for the Town was complete except for documentation.
56. Pathiakis admits that he contracted to the Town through TWM Systems and accomplished the configuration of the server and was paid for the services.<sup>15</sup>
57. Pathiakis worked 70 hours on the Town contract.

58. Pathiakis' work for TWM Systems included training a TWM Systems employee in the installation of the operating system.
59. When the UTC received a bill, William Young, an UTC member, would prepare an UTC expense voucher. The UTC committee members would sign the voucher. Young would give the voucher to the Town accountant who would place it on a warrant for the Selectmen. The Selectmen would approve the warrant one or two weeks after the UTC approved the voucher. After the Selectmen approved the warrant, the Town accountant would pay the bill by Town check.
60. After receiving the TWM Systems invoice dated January 4, 2002, the UTC, on January 8, 2002, signed a voucher for 70 hours at \$65 per hour, totaling \$4,550 to configure the server. This amount was within the quote received from TWM Systems.
61. The Town paid TWM Systems \$4,550 on January 18, 2003. Payment for the configuration came from the UTC budget.
62. At the January 8, 2002 meeting, the UTC approved the configuration and implementation of the unit file sharing facilities and a contract with TWM Systems for twenty hours of additional contracting work to complete the configuration at a cost of \$1,300. Pathiakis abstained from the vote.
63. TWM Systems submitted a billing invoice dated January 10, 2002 to the UTC in the amount of \$1,300 for creating infrastructure for file sharing. Pathiakis performed the work for TWM Systems.
64. TWM System's policy was to receive payment from the client prior to paying its subcontractors.
65. TWM Systems issued three checks to Paul Pathiakis: No. 6673 dated January 31, 2002 for \$4,000, No. 6852 dated April 5, 2002 for \$200; and No. 6866 dated April 18, 2002 for \$1,000.
66. As of May 12, 2002 Pathiakis had received \$5,200 from TWM Systems for work on the Town server.
67. Pathiakis, on behalf of the UTC, gave a quarterly committee update to the Board of Selectmen on January 8, 2002. The update included the server configuration and the new computer installation.
68. At the January 8, 2002 meeting, Pathiakis informed the Selectmen that the server had been configured and functioning for the last fourteen days and was almost complete.

69. At the January 8, 2002 Selectmen's meeting, Pathiakis informed the Selectmen that, while he was a member of the UTC, he also was the contractor with TWM Systems.<sup>16</sup>
70. When questioned by the Selectmen about the need to award a contract for the server configuration to a third party, Pathiakis answered that the UTC members did not have the expertise to do the work themselves.<sup>17</sup>
71. At the January 8, 2002 meeting the Selectmen expressed concerns about conflict of interest and directed Pathiakis to seek information about conflict of interest and to check with the Town Clerk about filing a disclosure form.<sup>18</sup>
72. The Board of Selectmen thanked Pathiakis for his work on the server.
73. After January 8, 2002, the Town Clerk provided Pathiakis with a conflict of interest brochure containing the telephone number of the Ethics Commission. She recommended that he call the Ethics Commission. At Pathiakis' request, the Town Clerk gave him a disclosure form.
74. The UTC met with the Board of Selectmen on February 6, 2002. At that time Pathiakis reported that the server was installed and working well.
75. At the February 6, 2002 meeting, Pathiakis admitted that he had not filed any disclosure form about conflict of interest. Pathiakis admitted that he had not looked at the conflict of interest law prior to January 5, 2002.<sup>19</sup>
76. Paul Pathiakis filed a disclosure, dated February 8, 2002, under G. L. c. 268A § 23, disclosing "freelance contractor doing network and systems administration."
77. At the February 13, 2002 meeting the UTC agreed to pay TWM Systems \$1,300 for the additional programming work on the server that had been authorized January 8, 2002. Pathiakis abstained from this vote.
78. Pathiakis resigned from the UTC on February 13, 2002.
79. The Board of Selectmen did not, in writing, authorize Pathiakis to participate in the selection of the vendor to configure the Town's server.
80. The Board of Selectmen did not, in writing, grant Pathiakis an exemption under the conflict of interest law to have a financial interest in a Town contract.
81. Selectman Shanahan did not advise Pathiakis that the Selectmen ever approved his subcontract.<sup>20</sup>
82. Pathiakis did not discuss, with Tom McGovern, the return of any of the monies to the Town.



83. William Young was not aware that any UTC members were designated special municipal employees.

### **III. Decision**

#### **A. Respondent's Motion for a Directed Verdict**

After the Petitioner's opening statement, at the close of the Petitioner's case, and at the close of all of the evidence, Pathiakis moved for a directed verdict on the grounds that the Petitioner failed to plead the elements of the alleged violations and failed to prove the violations. The Presiding Officer denied the Motion each time. Since our Rules of Practice and Procedure, 930 CMR *et. seq.*, make no provision for a directed verdict, we will treat the Respondent's Motion as a Motion to Dismiss under 930 CMR 1.01(6)(d).<sup>21</sup> For the reasons discussed below, we agree with the Presiding Officer that the Respondent is not entitled to a dismissal.

Pathiakis argues that the Petitioner did not plead the elements of the alleged violations with sufficient particularity so that he had sufficient notice of the violations in order to prepare a defense. After reviewing the OTSC and the entire proceedings of this case, we conclude that the Respondent's argument is without merit. The Respondent was provided with sufficient notice and a full opportunity to defend.

The Supreme Judicial Court has summarized the law concerning the adequacy of notice to be given in adjudicatory proceedings as follows:

A state administrative agency conducting an adjudicatory proceeding is required to give all parties 'reasonable notice' that is sufficient 'to afford them reasonable opportunity to prepare and present evidence and argument.' 'Due process requires that, in any proceeding to be accorded finality, notice must be given that is reasonably calculated to apprise an interested party of the proceeding and to afford him an opportunity to present his case.' While the State statute and constitutional principles require an agency to be reasonable and to comply with standards of 'natural justice and fair play,' administrative hearings need not comport with any particular form. As long as an agency gives adequate notice of the grounds for the hearing, it is not required to turn over all the evidence it will introduce to support those grounds. (citations omitted)<sup>22</sup>

The OTSC provided the citation to the relevant statutory sections charged as well as a paraphrase of the statutory language. The OTSC identified the factual basis for each of the elements of the charges, including a time frame. For example, in the G.L. c. 268A, § 19 charge, in separate numbered paragraphs, the Petitioner identifies facts alleging that Pathiakis was a municipal employee, what he did to

participate, what the particular matter was, and what his financial interest in the matter was. Similarly, in the G.L. c. 268A, § 20 charge, the Petitioner further identifies the relevant contract and the facts describing Pathiakakis' financial interest in the contract. The OTSC also put the Respondent on notice that penalties may attach if a violation were found.

Furthermore, during the preliminary inquiry and before the OTSC even issued, Pathiakakis, represented by the same counsel, gave a deposition at the Commission. He had knowledge, from the questions asked, of the events being investigated. Subsequently, he obtained discovery from the Petitioner. He obtained a witness list prior to the hearing. Furthermore, if he was unable to understand the charges, he could have moved for a More Definite Statement, pursuant to 930 CMR 1.01(6)(b). He did not do so.

He was represented by counsel throughout these proceedings. His counsel has been an active participant at the hearing. Both parties were given several months to prepare for the adjudicatory hearing. Pathiakakis' counsel was able to admit evidence, present witnesses and cross-examine the Petitioner's witnesses. She was given opportunities to make opening and closing statements. It is clear from her written submissions that she was aware of all of the elements of the charges against her client.

In conclusion, we find that Pathiakakis received adequate notice of each of the charges. Further, he was afforded and utilized all of the rights offered to a party in an adjudicatory hearing.<sup>23</sup>

Pathiakakis further attacks the OTSC by asserting that the Petitioner has the burden to plead and prove a negation of every exemption in G.L. c. 268A, §§ 19 and 20. We disagree. Consistent with the legislative history of G.L. c. 268A and the relevant judicial rules of pleading, the burden of proof of an exemption rests with the Respondent claiming the exemption.<sup>24</sup> In a prior Commission Decision and Order concerning § 19, *In re Cellucci*, 1988 SEC 346, the Commission confronted the same argument. The Commission determined that a written determination from one's appointing authority under § 19(b)(1) was an exemption to be proven by the Respondent, stating

were we to assign the burden of proof of the exemption to the petitioner, such an allocation would be plainly inconsistent with an expressed intent of the original framers of G.L. c. 268A. In its Final Report, the Special Commission of Code of Ethics explained that the format they had chosen for the statute 'was deliberately designed in order to avoid the necessity of indictment and proof which must carry the burden of negating all such possible exceptions and exemptions' and declared that '[I]t was the judgment of the [Special] Commission that the burden of proof of an exception or exemption should be on the public official who claims it.'<sup>25</sup>

Therefore, the Petitioner was not required to plead or prove the non-applicability of an exemption from the requirements § 19 or § 20. Rather, the burden of proof rests with the Respondent claiming an exemption.

The Respondent also argues that this case should be dismissed because the Petitioner has not proven the violations by a preponderance of the evidence. As we discuss below, we find that the Petitioner has proven the violations by a preponderance of the evidence. In conclusion, the Commission re-affirms the denial of the Directed Verdict Motion.

## **B. Substantive Violations**

### **1. Jurisdiction**

As a preliminary jurisdictional matter, we must decide whether Pathiakakis, during the relevant time frame, was a municipal employee subject to G.L. c. 268A. The Respondent admits that he was a member of the UTC during the relevant time frame, but denies that he was a “municipal employee” subject to the conflict of interest law.

G.L. c. 268A, § 1(g) defines “municipal employee” as

a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution.

“Municipal agency” is defined as

any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder.<sup>26</sup>

The Commission generally considers the following factors in determining whether a particular entity, such as the UTC, is a public instrumentality for purposes of G.L. c. 268A:

- (a) the impetus for the creation of the entity (e.g. legislative or administrative action);

- (b) the entity's performance of some essentially governmental function;
- (c) whether the entity receives or expends public funds; and
- (d) the extent of control and supervision exercised by governmental officials or agencies over the entity.<sup>27</sup>

In response to an opinion of the Supreme Judicial Court, MBTA Retirement Board v. State Ethics Commission, 414 Mass. 582 (1993), the Commission has also considered whether, in light of the preceding factors, "there are any private interests involved, or whether the states or political subdivisions have the powers and interests of an owner."

Applying these factors, we conclude that the UTC is a municipal agency as defined by G.L. c. 268A. We find, by a preponderance of the evidence, that the UTC was created by vote of the Upton Town Meeting as a standing committee of the Town. All of the members are appointed by the Board of Selectmen and provide quarterly reports to the Selectmen. The UTC is charged with managing the Town's technology needs. Thus, its sole purpose is to serve municipal government. It operates as a formal permanent committee of the Town, rather than as an ad hoc body. It is funded by tax revenues and has the authority to expend those revenues. The Town Meeting approves the UTC yearly budget. There are no private interests involved.

Further, we find, by a preponderance of the evidence, that Pathiakakis, as an UTC member, was "performing services" for and "holding membership" in a municipal agency. He was appointed to and took an oath of office when he became a member of the UTC. He was an active member. The definition of "municipal employee" has been broadly defined in the statute. One does not have to be compensated or a full-time employee in order to fall within the definition.

The Respondent argues, as an affirmative defense, that, if the Commission finds that he was a municipal employee, then he was a "special municipal employee." "Special municipal employee" is defined as

a municipal employee who is not a mayor, a member of the board of aldermen, a member of a city council, or a selectman in a town with a population in excess of ten thousand persons and whose position has been expressly classified by the city council, or board of aldermen if there is no city council, or board of selectmen, as that of a special employee under the terms and provisions of this chapter; provided, however, that a selectman in a town with a population of ten thousand or fewer persons shall be a special municipal employee without being expressly so

classified. All employees who hold equivalent offices, positions, employment or membership in the same municipal agency shall have the same classification; provided, however, no municipal employee shall be classified as a "special municipal employee" unless he occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special municipal employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation. All employees of any city or town wherein no such classification has been made shall be deemed to be "municipal employees" and shall be subject to all the provisions of this chapter with respect thereto without exception.<sup>28</sup>

Pathiakis has not proven, by a preponderance of the evidence, that he and the other members of the UTC, during the relevant time frame, had been designated "special municipal employees" by the Board of Selectmen.<sup>29</sup> There is no evidence that the Board of Selectmen voted to designate members of the UTC as special municipal employees, as required by G.L. c. 268A, § 1(n). One member of the UTC indicated that he was not aware that the UTC had ever been so designated. There is no evidence that Selectman Shanahan unilaterally designated the UTC as special municipal employees. She had no power to do so. Although there was evidence that certain other positions and boards in Town government had been designated, at various times, as special municipal employees, this evidence is irrelevant on the issue of whether the UTC was so designated.

In conclusion we find that the Petitioner has proven, by a preponderance of the evidence, that Pathiakis was a municipal employee subject to the provisions of G.L. c. 268A during the relevant time period. We find that Pathiakis has not proven that he was a "special municipal employee."

## 2. Section 19

G.L. c. 268A, § 19 is violated if "a municipal employee. . . participates as such an employee in a particular matter in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest." As the

Commission has recognized, this section “embodies what has been described as ‘the most obvious of all conflict-of-interest principles’—namely, that a public official does not act in his official capacity with respect to matters in which he has a private stake.”<sup>30</sup>

Thus, the Petitioner must prove, by a preponderance of the evidence, that: Pathiakis (a) was a municipal employee; (b) participated as such an employee; (c) in a particular matter; (d) in which he had a financial interest; and (e) that he had knowledge of the financial interest. As discussed above, the Petitioner has proven that Pathiakis is a municipal employee. Following is a discussion of each of the other elements of § 19.

First, the term “participate” is defined as “participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.”<sup>31</sup> The Supreme Judicial Court has indicated that this definition includes more than merely rendering a vote on a matter.<sup>32</sup> According to the Court, “to participate in the formulation of a matter for vote is to participate in the matter.”<sup>33</sup>

G.L. c. 268A requires that the participation be “personal and substantial.” Not all participation rises to this level. When interpreting the modifying terms “personal and substantial” the Commission has been guided by the interpretations of the federal Office of Government Ethics, as the Legislature, in promulgating G.L. c. 268A, adopted portions of the federal conflict of interest statute. The federal statute also contains the term “personal and substantial.”<sup>34</sup>

By regulation, 5 C.F.R. § 2637.201, the Office of Government Ethics has described and clarified the phrase “personal and substantial participation” stating:

To participate ‘personally’ means directly, and includes the participation of a subordinate when actually directed by the former government employee in the matter. ‘Substantially,’ means that the employee’s involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort.

For example, the Commission has concluded that if one discusses or makes recommendations on the merits of a matter one will be deemed to have participated personally and substantially in a matter.<sup>35</sup> Moreover, one may participate in a particular matter by supervising or overseeing others.<sup>36</sup>

In comparison, if a public employee merely provides information to the decision-makers, without providing any substantive recommendation, or the employee's actions are peripheral to the merits of the decision process, the employee's actions will not be considered to be personal and substantial participation.<sup>37</sup>

Under § 19, the municipal employee's participation needs to be in a "particular matter." "Particular matter" is defined as "any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property."<sup>38</sup>

Under § 19, a municipal employee is required to abstain if he has a financial interest in the particular matter in which he is to participate. The term "financial interest" is not defined in G.L. c. 268A.<sup>39</sup> The Commission, in longstanding rulings, has stated that this section encompasses any financial interest without regard to the size of said interest. The financial interest, however, must be direct and immediate or reasonably foreseeable.<sup>40</sup> Financial interests which are remote, speculative or not sufficiently identifiable do not require disqualification under G.L. c. 268A.<sup>41</sup>

Finally, the municipal employee who participates in a particular matter must have knowledge of his financial interest in the matter. "Knowledge" has been defined as "the fact or condition of knowing something with a considerable degree of familiarity gained through experience of or contact or association with the thing; the fact or condition of being cognizant, conscious or aware of something."<sup>42</sup> "Proof of actual knowledge is frequently shown where one is in possession of information of such weight and reliability that men commonly act upon it as true. Absolute certainty is not required."<sup>43</sup>

Applying these legal principles to the facts, we find that the Petitioner has proven, by a preponderance of the evidence, that Pathiakis violated G.L. c. 268A, § 19. First, the Petitioner has alleged, in the OTSC, that the UTC's selection of a vendor was a particular matter. We agree that the UTC decision/determination to retain TWM Systems is a particular matter.

We find, by a preponderance of the evidence, that Pathiakis personally and substantially participated in the decision to select TWM Systems. Although Pathiakis, as an UTC member, abstained from the relevant votes, he was otherwise an active participant. He admitted that he participated in the initial discussions to hire a vendor to configure the server. In one email, he admits that it was his suggestion to the UTC that he subcontract to perform the work if he could get compensated for his efforts. He was instructed, by the UTC to prepare a request for quotes, obtain quotes, evaluate the quotes, and negotiate a deal. He has admitted that he did each of these actions. At the time that he prepared the quotes, he knew that if he found the quotes unacceptable, he could offer his services to the contractor.

As an UTC member, he sought an agreement with Tom McGovern to permit him to contract to TWM Systems and to do the work for the Town. He suggested the price that Tom McGovern should quote the Town. In an e-mail to Tom McGovern, Pathiakis, on behalf of the UTC, accepted this quote. He presented the quote to the UTC at its December 19, 2001 meeting, reviewed his efforts to obtain a vendor, informed the UTC that TWM Systems was the only quote, and reviewed the work he had performed to date on the computer server for TWM Systems. All of these actions were substantive, not incidental or peripheral, and constituted personal and substantial participation.

Additionally, at the time he so participated, he knew he had a financial interest in the proposed contract. He had suggested, at the December 5, 2001 UTC meeting, that he could do the work if compensated. He knew that the rest of the UTC members had accepted his suggestion before he formulated a request for quotes. He had a financial interest when he formulated the request for quotes because if no vendor could do the work, he was going to seek a subcontract for himself. If a vendor could do the work, then he lost the opportunity for employment. Either situation would affect his financial interest.<sup>44</sup>

Further, by the time that the UTC decided to retain TWM Systems, Pathiakis had negotiated his own compensation with McGovern to submit to the UTC as a quote. At the time he presented the proposal to the UTC he had started the work and knew TWM Systems had agreed to compensate him.

Section 19 contains an exemption procedure in § 19(b)(1).<sup>45</sup> Section 19(b)(1) states:

It shall not be a violation of this section if the municipal employee first advises the official responsible for appointment to his position of the nature and circumstances of the particular matter and makes full disclosure of such financial interest, and receives in advance a written determination made by that official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee

The Commission has instructed public officials that:

the requirement that the disclosure and authorization be in writing serves at least two purposes. First, it establishes a record of both the disclosure and subsequent determination of the appointing authority, a record which, among other things, protects the interest of the [public] employee if allegations of impropriety should arise. Second, it forces both the [public] employee and the appointing authority to consider carefully the nature of the conflict of interest and



the options available for dealing with that conflict....These provisions are more than mere technicalities. They protect the public interest from potentially serious harm. The steps of the disclosure and exemption procedure-particularly that the determination be in writing...are designed to prevent an appointing authority from making an uninformed, ill-advised or badly motivated decision.<sup>46</sup>

Pathiakis asserts, in an affirmative defense, that he complied with the conflict of interest law when he made a disclosure in February 2002 under G.L. c. 268A, § 23. He further asserts that one member of the Board of Selectmen, Ms. Shanahan, approved the actions of the UTC and Pathiakis.

Pathiakis' purported disclosure under G.L. c. 268A, § 23, a statutory section neither pled nor applicable in this case, is inadequate and does not comply with § 19(b)(1). The disclosure should have been completed prior to Pathiakis' seeking quotes for the server work, not after the work was complete. Section 19 places a duty on a municipal employee to advise his appointing authority of the nature and circumstances of the particular matter and to make a "full disclosure" of the financial interest. We have reviewed Pathiakis' disclosure and find that it fails to disclose the fact that he received compensation for performing the server work and fails to disclose the details of the compensation arrangement. Additionally, the disclosure does not contain information regarding what the work entailed, for whom he was doing the work, and the details and time frame of the work performed in December 2001/January 2002.

Finally, Pathiakis could not file a disclosure and then take action until his appointing authority had given a written determination that the conflict was not so substantial as to affect the integrity of his services to the Town. Pathiakis has not proven, by a preponderance of the evidence, that he received a written determination prior to his participation in the vendor selection. There is no evidence that a written determination was ever done.

The evidence indicates that Selectman Shanahan knew that Pathiakis was going to perform this work. But, Pathiakis' appointing authority was the Board of Selectmen, not Shanahan. Therefore, even if Shanahan consented to Pathiakis' performance of the work, this consent was inadequate, as a matter of law. Moreover, the evidence demonstrates that Shanahan did not have the authority to bind the entire Board of Selectmen, and she had advised Pathiakis that she thought he could not perform the work while he remained on the UTC.

Notwithstanding his representation to Tom McGovern that he had permission to subcontract the work, the evidence does not support a finding that Pathiakis had the permission of the Board of Selectmen. It appears that he only had the permission of his fellow UTC members.

In conclusion, we find, by a preponderance of the evidence, that Pathiakias violated G.L. c. 268A, § 19, by participating in the decision to select TWM Systems to configure the server. Further, we find that Pathiakias has not proven, by a preponderance of the evidence, that he obtained a written determination from his appointing authority, pursuant to § 19(b)(1), that would have permitted him to participate in the matter.

### 3. Section 20

G.L. c. 268A, § 20 states, “A municipal employee who has a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town, in which the city or town is an interested party of which financial interest he has knowledge or has reason to know, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.”

As articulated by William Buss, one of the commentators on the Massachusetts conflict of interest law:

[S]ection 7 (state counterpart to § 20) announces a rule the basis of which is that, if no exemption is applicable, any state employee is in a position to influence the awarding of contracts by any state agency in a way which may be financially beneficial to himself. In a sense, the rule is a prophylactic one. Because it is impossible to articulate a standard by which one can distinguish between employees in a position to influence and those who are not, all will be treated as though they have influence. Therefore, because a state employee, in some circumstances, might use his position to see that contracts are awarded, not just to his own company but to companies with which his company does business, it is assumed by the statute that such circumstances always exist unless an exemption can be shown to be applicable.<sup>47</sup>

Thus, to find a violation under § 20, the Petitioner does not need to prove and the Commission does not need to find actual inside influence. Nor is the amount of the financial interest significant in finding a violation. The Commission needs to find that the Petitioner proved, by a preponderance of the evidence, that: (a) Pathiakias was a municipal employee; (b) who had a direct or indirect financial interest of which he had knowledge or reason to know; (c) in a contract made by a municipal agency; (d) in which the Town is an interested party.

The Commission has stated that “for purposes of G.L. c. 268A, the term ‘contract’ refers not only to a formal, written document setting forth the terms of two or more parties’ agreements, but also has a much more general sense. Basically, any type of agreement or arrangement between two or more parties, under which each undertakes

certain obligations in consideration for promises made by the other, constitutes a contract.”<sup>48</sup> Similar to the facts in the case before us, the Commission has previously found that public employees have indirect financial interests in public contracts, for purposes of § 20, when they subcontract to an entity that has a public contract.<sup>49</sup>

We find that the Petitioner has proven that there was a contract between TWM Systems and the UTC. TWM Systems provided a quote to perform services over 70 hours to configure the new server at a rate of \$65/hour. First Pathiakias, and subsequently the UTC, accepted the quote. The work was completed and the UTC paid TWM Systems’ invoiced bill. Clearly the Town, as the direct beneficiary of the work, was an interested party. The UTC, as a Town agency, was also a party.

Further, the Petitioner has proven that Pathiakias had an indirect financial interest in the contract and that he knew or had reason to know of the financial interest. He admitted that he performed the computer server work. He admitted that he received compensation from TWM Systems for the work. Pathiakias established the billing rate used by TWM Systems. Almost the entire billing rate was Pathiakias’ compensation for doing the work. TWM Systems retained only \$5/hour as an administrative overhead fee. Pathiakias prepared the work hours documents from which the billing invoices were prepared. Shortly after TWM Systems received payment from the Town, it paid Pathiakias. Tom McGovern testified credibly that his policy was to bill his client and, after receiving payment, pay any subcontractors. But for the administrative costs, TWM Systems was almost a “pass through” of the funds between the Town and Pathiakias. Pathiakias completed the work and received partial payment prior to resigning from the UTC.

Pathiakias asserts, as an affirmative defense, that he filed a disclosure and resigned from the UTC, thus, alleviating any § 20 violation. There is no exemption in § 20 that would permit a municipal employee to contract with his own agency. The only available exemption under § 20 is § 20(d), which permits a special municipal employee to have a financial interest in a contract with his own agency. Section 20(d) requires a special municipal employee to file a full disclosure with the Town Clerk and obtain approval of an exemption from the Selectmen. As discussed above, Pathiakias has not proven, by a preponderance of the evidence, that he had been designated a special municipal employee, had made a full disclosure in a timely fashion, and had obtained an exemption from the Selectmen.

Section 20 also states that “This section shall not apply: to a municipal employee who in good faith and within thirty days after he learns of an actual or prospective violation of this section makes full disclosure of his financial interest to the contracting agency and terminates or disposes of the interest.” Pathiakias asserts that he complied with this section when he resigned from the UTC in February 2002. However, under this exemption he is not required to resign, he is required to dispose of the financial interest. He has not returned, to the Town, any of the monies he received. Also, by the time he resigned, he had entered his contract with TWM Systems, had received partial payment, and had completed the work.

In conclusion, the Commission finds that the Petitioner has proven a violation of § 20 and that Pathiakis has not proven that he was entitled to or complied with an exemption from § 20.

#### **IV. Conclusion**

The Petitioner has proven, by a preponderance of the evidence, that Pathiakis violated G.L. c. 268A, § 19 when he participated, as an UTC member, in the decision to select a computer vendor while he had an agreement with the vendor to be compensated to do the computer work. The Petitioner has also proven, by a preponderance of the evidence, that Pathiakis violated G.L. c. 268A, § 20 by knowingly or with reason to know having an indirect financial interest in the TWM Systems/UTC contract while he remained a municipal employee.

#### **V. Order**

Having concluded that the Respondent violated G.L. c. 268A, § 19 and § 20 and pursuant to the authority granted it by G.L. c. 268B, § 4(j), the State Ethics Commission hereby **orders** Paul Pathiakis to pay a civil penalty of **\$ 2000** for the violation of G.L. c. 268A, § 19 and a civil penalty of **\$ 2000** for the violation of G.L. c. 268A, § 20, resulting in an aggregate total civil penalty of **\$ 4000**.

**DATE AUTHORIZED:** March 31, 2004

**DATE ISSUED:** April 12, 2004

#### **SIGNED:**

E. George Daher, Chairman  
Elizabeth J. Dolan  
Christine M. Roach  
J. Owen Todd  
Tracey Maclin

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<sup>1</sup> Chairman Wagner participated in the preliminary deliberation of this matter, but his term expired during the pendency of these proceedings, prior to a Commission decision, and he is not a signatory to this Decision and Order.

<sup>2</sup> Chairman Daher's term began during the pendency of these deliberations. He has reviewed the relevant portions of the record of the proceedings, including the transcript and the parties' memoranda. He has participated in the deliberations of this matter and is a signatory to the Decision and Order.

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<sup>3</sup> Commission Maclin's term began during the pendency of these proceedings. He has reviewed the relevant portions of the record of the proceedings, including the transcript and the parties' memoranda. He has participated in the deliberations of this matter and is a signatory to the Decision and Order.

<sup>4</sup> The Presiding Officer found Ms. Shanahan's testimony on this point to be credible.

<sup>5</sup> The Presiding Officer found Ms. Shanahan's testimony on this point to be credible. Her testimony was also consistent with statements she made during a joint videotaped UTC/Board of Selectman Meeting on February 6, 2002. The videotape of this meeting was admitted into evidence without objection.

<sup>6</sup> Although Ms. Shanahan's testimony about the state of her knowledge was evasive, the Presiding Officer credits her statements, made under cross-examination. Shanahan testified "I stated I knew back in December. I did. That he said he was going to contract. I did not know whether he did or not."

<sup>7</sup> The Presiding Officer found Mr. McGovern's testimony on this point to be credible.

<sup>8</sup> We credit the videotape of the February 6, 2002 Selectman's meeting. At that meeting Pathiakias admitted to the Selectmen that he participated in the December 5, 2001 discussions to find a vendor to configure the server.

<sup>9</sup> We credit the videotape of the February 6, 2002 Selectman's meeting. At that meeting Pathiakias admitted that he suggested he could do the computer server work if no vendor was available to do the work. We also credit an email between Pathiakias and Bill Huang, Minutes of the December 5, 2001 UTC meeting, and Pathiakias' Answers to Interrogatories.

<sup>10</sup> We credit the videotape of the February 6, 2002 Selectman's meeting. At that meeting Pathiakias admitted that he suggested he could do the computer server work if no vendor was available to do the work. We also credit an email between Pathiakias and Bill Huang, Minutes of the December 5, 2001 UTC meeting, and Pathiakias' Answers to Interrogatories.

<sup>11</sup> The Presiding Officer found Tom McGovern's testimony on this point to be credible.

<sup>12</sup> The Presiding Officer found Tom McGovern's testimony credible.

<sup>13</sup> In a December 15, 2001 e-mail to Tom McGovern, Pathiakias wrote "everything looks and sounds good. Please send the quote. I'll ok it."

<sup>14</sup> We credit a portion of Pathiakias' sworn deposition testimony, admitted into evidence, where he testified "the December 19<sup>th</sup> comes and Dave Anderson, Darryl, Bill Young, myself are in attendance and we go over and basically say you know how's things going. I'm like well the vendor that I found was TWM. They've agreed to allow me to subcontract. I've done the rough and I'm gonna go forward with the full configuration and try and get it done by the end of the year . . ." The Presiding Officer also found Tom McGovern credible on this point. We also credit an email from Pathiakias to Tom McGovern on December 18, 2001, describing his work progress on the server.

<sup>15</sup> We credit e-mails Pathiakias sent to Bill Huang and Joan Shanahan, as well as Pathiakias' sworn deposition testimony. We also credit Pathiakias' statements at a videotaped Board of Selectmen meeting on January 8, 2002. The videotape was admitted into evidence without objection.

<sup>16</sup> We credit the videotape of the January 8, 2002 Selectmen's meeting.

<sup>17</sup> We credit the videotape of the January 8, 2002 Selectmen's meeting.

<sup>18</sup> We credit the videotape of the January 8, 2002 Selectmen's meeting.

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<sup>19</sup> We credit statements made by Pathiaklis in response to questions by the Board of Selectmen at the videotaped February 6, 2002 Selectmen's meeting.

<sup>20</sup> We credit Pathiaklis' sworn deposition testimony: "Q: Did Joan ever tell you that the selectmen-the board of selectmen had approved of your subcontract? A: No. I don't believe she ever did."

<sup>21</sup> 930 CMR 1.01(6)(d) states: "the Respondent may move to dismiss for failure of the Petitioner to prosecute or to comply with 930 CMR *et seq.* or with any order of the Commission or Presiding Officer. Upon completion by the Petitioner of the presentation of evidence, the Respondent may move to dismiss on the grounds that, upon the facts and/or the law, the Petitioner has not sustained its case . . ."

<sup>22</sup> Strasnick v. Board of Registration in Pharmacy, 408 Mass. 654, 660-661 (1990); see also Vaspourakan, Ltd. v. Alcoholic Beverages Control Commission, 401 Mass. 347, 353-354 (1987); LaPointe v. License Board of Worcester, 389 Mass. 454, 458 (1983).

<sup>23</sup> According to G.L. c. 268B, § 4(f), "All parties shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, to submit evidence, and to be represented by counsel."

<sup>24</sup> *In re Cellucci*, 1988 SEC 346.

<sup>25</sup> *In re Cellucci*, at 349.

<sup>26</sup> G.L. c. 268A, § 1(f).

<sup>27</sup> *See EC-COI-95-10; 94-7; 89-24.*

<sup>28</sup> G.L. c. 268A, § 1(n).

<sup>29</sup> The Respondent has the burden of proving an affirmative defense. The Petitioner is not required to plead, as part of its case, that the UTC were not "special municipal employees."

<sup>30</sup> *In re Craven*, 1980 SEC 17, 21 (citing W.G. Buss, "The Massachusetts Conflict-of-Interest Statute: An Analysis," 45 B.U.L. Rev. 299, 353 (1965)).

<sup>31</sup> G.L. c. 268A, § 1(j).

<sup>32</sup> Graham v. McGrail, 370 Mass. 133, 138 (1976).

<sup>33</sup> Id., see also EC-COI-98-3; In re Geary, 1987 SEC 305, 306-07 (participation need not be influential or determinative of result).

<sup>34</sup> *EC-COI-98-3.*

<sup>35</sup> *See EC-COI-89-2* (discussion of the merits of a particular matter); *87-19* (participation includes any discussion, recommendation, vote, investigation); *85-75* (participation includes reviewing and making recommendations to others); *79-74* (participation found where employee discussed with decision-makers factors that were central considerations of the final evaluation of a contract even if employee did not participate in selection, final review, approval and execution of contract); *In re Craven*, 1980 SEC 17, *aff'd*, Craven v. State Ethics Commission, 390 Mass 101, 202 (1983) (state representative participated by using position to exert pressure on agency to award contract).

<sup>36</sup> *See EC-COI-93-16; 87-27; 89-7.*

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<sup>37</sup> See e.g., *EC-COI-85-48* (forwarding claim to appropriate staff for review and determination); *82-138*; *82-82* (providing peripheral information in the decision-making process); *EC-COI-81-159* (initial suggestions regarding division's operational needs not related to ultimate decision to contract).

<sup>38</sup> G.L. c. 268A, § 1(k).

<sup>39</sup> See, Graham v. McGrail, 370 Mass. 133, 138 (1976)(statute deficient for not defining term financial interest).

<sup>40</sup> See, e.g., *EC-COI-92-12*; *90-14*; *89-33*; *89-5*.

<sup>41</sup> See, e.g., *EC-COI-89-19*; *87-16*.

<sup>42</sup> Webster's Third New International Dictionary, unabridged.

<sup>43</sup> West's Case, 313 Mass. 146,150 (1943).

<sup>44</sup> It was likely that Pathiakos would be able to obtain an employment opportunity for himself. At the December 5, 2001 meeting the Board was not certain it could afford or find an outside vendor. Moreover, Tom McGovern testified credibly that he had indicated sometime in November, when the UTC purchased the hardware, that TWM Systems could not configure the new server.

<sup>45</sup> There are two additional exemptions in § 19, neither of which is relevant to these proceedings.

<sup>46</sup> *In re Deirdre Ling*, 1990 SEC 456, 458-459.

<sup>47</sup> Buss, *The Massachusetts Conflict-of-Interest Statute: An Analysis*, 45 B.U.L. Rev. 299, 373-374 (1965); see also, *EC-COI-82-109*.

<sup>48</sup> *EC-COI-87-14*; see Quinn v. State Ethics Commission, 401 Mass. 210, 216 (contract a bargained-for exchange of offer, acceptance, and consideration).

<sup>49</sup> See P.E.L. 98-2 (subcontract to provide services to general contractor on school renovation project); *EC-COI-90-17* (subcontract to provide printing services to a client to help client provide work under state contract); *In re McMann*, 1988 SEC 379 (respondent arranged for a straw company to provide goods to school and then pay him from proceeds).